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APR 12 1979

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

APR 11 1979

STUART CUNNINGHAM
o'clock
CLERK

BALLY MANUFACTURING CORPORATION,)

Plaintiff,)

v.)

D. GOTTLIEB & CO. and)
WILLIAMS ELECTRONICS, INC.)

Defendants.)

CIVIL ACTION NO. 78 C 2246

PLAINTIFF'S MOTION TO COMPEL APPEARANCE
OF MICHAEL STROLL, PRESIDENT OF DEFENDANT
WILLIAMS, FOR COMPLETION OF HIS DEPOSITION

Plaintiff moves this Court under Rule 37(a) for an order compelling Michael Stroll, President of Defendant Williams Electronics, Inc., to appear at a time mutually agreeable to the parties for completion of his noticed deposition. Opposing counsel met in an attempt to resolve this problem pursuant to Local Rule 12(d) during the evening of April 9, 1979, but without success.*

The grounds for this motion are as follows:

(1) On December 15, 1978, Plaintiff served notice of taking the deposition of Michael Stroll, President of Defendant Williams Electronics, Inc., on December 27, 1978. At the request of Defendant Williams and by agreement,

*The counsel present were: Donald L. Welsh and A. Sidney Katz for plaintiff and Melvin M. Goldenberg, Wm. T. Rifkin, John Lynch, Wayne Harding, and Leroy Mitchell for defendants.

the taking of the deposition was rescheduled for February 14, 1979, and rescheduled again at Williams' request for March 6 when it was commenced.

(2) Also, in December, 1978, Plaintiff served its first request for production of documents and things to Defendant Williams and expected that they would ultimately be produced prior to Mr. Stroll's deposition on March 6, 1979. At the beginning of the deposition on March 6, Defendant Williams' counsel, Mr. Goldenberg, stated that he would not produce any documents, although they were apparently available in his offices, because Plaintiff had not completed its own document production -- even though Plaintiff had already produced over 500 documents to Defendant Williams, and Plaintiff's counsel had indicated that it was working toward completion of the document production as soon as possible.

(3) In spite of this impediment, Plaintiff proceeded with Mr. Stroll's deposition without documents in an effort to advance discovery in this matter, having in mind the August 1, 1979 cut-off date. Mr. Stroll's deposition was adjourned at the end of that day and rescheduled to resume on April 9, 1979 with the hope that by that time the documents would be produced by Williams to enable the efficient examination of Mr. Stroll.

(4) After considerable discussions with Mr. Goldenberg, documents were finally produced to Plaintiff's attorneys on April 5, which documents were then used in connection with the deposition of Mr. Stroll on April 9. That afternoon, however, Mr. Goldenberg unilaterally advised Mr. Stroll that he could leave the deposition at 4 P.M. and that he need not ever return to complete his deposition unless ordered to by this Court. Mr. Stroll then left the deposition room. This was done without any agreement and over plaintiff's objections.

(TR 7-9)*

(5) There was no cause or justification for Mr. Goldenberg's actions. Furthermore, Mr. Goldenberg continuously attempted to, and in fact did, obstruct the taking of the deposition of Mr. Stroll by advising him that he did not have to look through folders of produced documents to determine which documents, if any, were those with which he was familiar, or which were those he had referred to in his earlier testimony on March 6 (TR 5-6). When documents were then individually shown to Mr. Stroll, Mr. Goldenberg objected that too much time was being taken

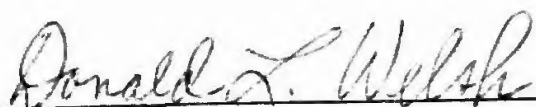
*Reference is to pages of certified excerpt from transcript of Stroll deposition on April 9, 1979, attached as Exhibit A.

with this witness. Additionally, Mr. Goldenberg advised Mr. Stroll not to answer various questions (TR 3-5). These questions were relevant and calculated to lead to admissible evidence and did not involve any problem with confidential business information.

(6) Unlike many cases where the defendant's president may not be knowledgeable about the subject matter in suit, in this case the Defendant's President Mr. Stroll, is probably the most knowledgeable witness concerning the subject matter in suit because (a) he was hired specifically for the purpose of developing the product which is now accused of infringing the patent in suit, (b) prior to his employment with the Defendant, he worked for one of defendant's suppliers in the development of a predecessor prototype to the commercial version of the accused product now being sold by Defendant, and (c) one of Mr. Stroll's first duties as president was to evaluate various previous systems proposed to Defendant Williams which led to their development of the accused product which employs the invention of the patent in suit. It was this very activity of Mr. Stroll that was being inquired into when the examination was thwarted by Mr. Goldenberg, and the witness left.

For the foregoing reasons, it is submitted that plaintiff should be permitted to complete the examination of Mr. Stroll and this motion should be granted.

BALLY MANUFACTURING CORPORATION


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Attorneys for Plaintiff

April 10, 1979

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BALLY MANUFACTURING CORPORATION,

Plaintiff/Counter-
Defendant,

vs.

D. GOTTLIEB & CO., etc., et al.,

Defendants/Counter-
Plaintiffs.

No. 78 C 2246

CERTIFICATION OF QUESTIONS

EXCERPT OF THE DEPOSITION of MICHAEL ROBERT STROLL, called by Plaintiff/Counter-Defendant for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before EDWARD GANS, a Notary Public within and for the County of Cook, State of Illinois, and a Certified Shorthand Reporter of said state, taken at Suite 900, 135 South LaSalle Street, Chicago, Illinois, on the 9th day of April, A.D. 1979, at 10:05 a.m.

PRESENT:

MESSRS. FITCH, EVEN & TABIN
(Suite 900, 135 South LaSalle Street,
Chicago, Illinois 60603), by:
MR. DONALD L. WELSH, and
MR. A. SIDNEY KATZ,

appeared on behalf of Plaintiff/
Counter-Defendant.

MESSRS. ARNOLD, WHITE & DURKEE
(2100 Transco Tower,
Houston, Texas 77056), by:
MR. JOHN LYNCH, and
MR. WAYNE M. HARDING,

appeared on behalf of D. Gottlieb
& Co., Defendant/Counter-Plaintiff;

MESSRS. MC DOUGALL, HERSH & SCOTT
(135 South LaSalle Street, Suite 1540,
Chicago, Illinois 60603), by:
MR. MELVIN M. GOLDENBERG,

appeared on behalf of Williams Electronics,
Defendants/Counter-Plaintiff.

MICHAEL ROBERT STROLL,

called as a witness herein by the Plaintiff/Counter-Defendant, having been previously first duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION
(Continued)

(WHEREUPON, proceedings were had
which are not herein transcribed.)

BY MR. WELSH:

Q Where physically was the original prototype located during that period from the time of the first power-on until it was fully operational?

A At Seeburg Products on Dayton Street.

Q Where is that in relation to the place where the Williams marketing and game design people worked?

A They are both in Chicago.

(WHEREUPON, proceedings were had
which are not herein transcribed.)

Q Did you have what might be considered a final demonstration?

A Yes.

Q At which you thought it was operational?

A Yes.

Q Who was present then?

A The Advance Development Group, and the names I am about to give you are, to the best of my recollection, the people that were there. There might be some others.

Jack Mittel.

Steve Kordek.

Frank Murphy.

Chris Ottis.

I think that's it.

Q How many times prior to that did you ask people from Williams to attend?

MR. GOLDENBERG: I object to the question and advise the witness that he need not answer it. My objection is based on the ground that it is not relevant, nor is it likely to lead to the discovery of admissible evidence.

BY MR. WELSH:

Q Are you going to answer or not?

A Counsel has advised me not to.

Q I believe counsel said you need not answer.

MR. GOLDENBERG: I in no case --

MR. WELSH: I did not take it as an instruction to not answer.

MR. GOLDENBERG: I in no case instruct a witness. I give him advice. My advice is that he need not answer.

BY MR. WELSH:

Q Do you refuse to answer?

A Yes.

(WHEREUPON, proceedings were had which are not herein transcribed.)

BY MR. WELSH:

Q Among the documents which were produced on behalf of Williams is one folder labeled "'Scamp' Grand Prix - Seeburg", which contains documents W212 through W259, and another folder labeled "SC/MP Game," bearing documents W260, apparently, through 286.

I ask you if you would examine the documents in these folders and note any which disclose or represent a part of or all of the Seeburg system which was one of the three which you evaluated at the time you commenced your employment at Seeburg.

MR. GOLDENBERG: I am going to advise the witness that he need not do that. I don't know how many documents there are in here, but there is a truly

significant number of drawings and, it looks like, program listings. Within the time available today I see no way that the witness can undertake to do that and that any of us, including the witness, can have any confidence in the answer he might give.

Let's go on to something else, sir.

MR. WELSH: I proposed that system to save time, Mr. Goldenberg, instead of going through it document by document, to see whether these were documents that he had in his possession or used in his evaluation.

Are you instructing him not to follow my request?

MR. GOLDENBERG: Yes, sir. I am. I don't think the witness should have to do your homework for you.

MR. WELSH: Mark that, too, please.

MR. GOLDENBERG: If there is a document in here and you have inspected it and it shows the Seeburg SC/MP Game, I have no objection to presenting that to the witness and having him answer the question. But to ask him to go through these two folders I think is burdensome and unwarranted.

MR. WELSH: Then we will do it document by document.

(WHEREUPON, proceedings were had

MR. GOLDENBERG: Mr. Welsh, it is four o'clock. Since it appears you are not going to complete this, we tell you that the deposition is over.

MR. WELSH: Are you going to instruct the witness not to answer any further questions?

MR. GOLDENBERG: I am going to instruct the witness that he is free to leave.

MR. WELSH: Are you stating that you are not going to produce the witness for any more examination?

MR. GOLDENBERG: Unless ordered by Court. That is correct.

BY MR. WELSH:

Q Are you going to leave, Mr. Stroll?

A If my counsel feels that it is appropriate for me to do so, then I will do so.

MR. GOLDENBERG: I believe it is, sir.

BY MR. WELSH:

Q Did you answer "yes"?

A I think I answered the question, Mr. Welsh.

(WHEREUPON, the witness and his counsel conferred.)

MR. GOLDENBERG: What Mr. Stroll said to me is if he can get it done, he is prepared to stay. But

you simply, as far as I can see, show a determination to drag this out interminably. We have to view it, and we think we are right in doing so, that this is harassment and nothing more.

MR. WELSH: I would certainly disagree with that.

MR. GOLDENBERG: In our view of the matter, we have been given no choice. We regret this, but I do not see an alternative.

BY MR. WELSH:

Q Is it your answer that you are not going to answer any more questions?

A I believe that Mr. Goldenberg has advised me not to, and unless we can come to an agreement that we will complete it today.

Q I cannot make that commitment at all.

MR. WELSH: We have another meeting scheduled with opposing counsel, a Rule 12(d) --

MR. LYNCH: That meeting, counsel--I am at your disposal all night long.

MR. WELSH: I am willing to go until reasonable hours, but not all night long, and I do not even consider that to be a reasonable suggestion.

MR. LYNCH: I am just saying that I am at your disposal at any time this evening. I am not suggesting that we ought to meet all night long. I just told you that so you need feel no constraints on your schedule based on my schedule.

MR. WELSH: As long as Mr. Goldenberg has instructed the witness not to answer and the witness has said that he will follow Mr. Goldenberg's instructions, then this deposition is adjourned, subject to Court Order.

MR. GOLDENBERG: Fine, sir.

(WHEREUPON, proceedings were had which are not herein transcribed, and at 4:15 o'clock p.m. the deposition adjourned sine die.)